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In the Supreme Court of the United States

1958

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

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BLANCHE DICK

Petitioner

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Blanche Dick, prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered and rendered against the petitioner on the 7th day of February, 1958. The opinion upon which this judgment is based is dated February 7, 1958. It is reported as case No. 15,760 in 252 F. 2d 43. Copies of the judgment and opinion are attached.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed is dated February 7, 1958 and it was entered on that day.

The petitioner relies upon the provisions of Amendment VII to the United States Constitution which preserves for her the right of trial by jury and *28 U. S. C. A.*, Section 2101 to have writ of certiorari granted, and to sustain the jurisdiction of this court.

QUESTIONS PRESENTED FOR REVIEW

Denial of trial by jury

Can the Circuit Court of Appeals deny Mrs. Dick, the petitioner, a trial by jury where there is evidence in the record consistent with accidental death, and where a jury has found that the death was not a suicide, and where the trial judge has refused to set aside the verdict of the jury?

Refusal to follow state law

Did the Circuit Court of Appeals have the right to refuse to follow the North Dakota law which for more than 50 years has held that the question of whether a death is suicidal is for the jury where there is evidence in the record consistent with accidental death? In this case the opinion of the Circuit Court of Appeals acknowledges that there was such evidence.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Amendment VII found in *U. S. C. A.*, Constitution, page 379. It reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

A CONCISE STATEMENT OF THE CASE

William Dick was a 47 year old farmer living on his farm near Englevale, North Dakota. On January 20, 1955 he died as a result of two shots from an old double barreled

shot gun. Death occurred in a silo shed at about 10 a.m. while he was in the process of doing his chores.

Mr. Dick was a happy, well adjusted man in good health. He was a man of modest means with no financial problems. The night before he died he took the time to help his 14 year old daughter with her General Science studies (R. p. 18). He slept soundly, ate a hearty breakfast, milked his cows, and had planned to help his neighbor make sausage (R. p. 8). He had said or done nothing to indicate that he contemplated suicide (Circuit Court Opinion, page 12).

Mr. Dick had commenced to feed his cattle at the outside feed troughs. It was his practice to put silage in the troughs, get a tub full of ground corn and then spread it over the silage (R. p. 13). A tub filled with ground corn was found a couple of steps from the feed troughs on the barn side of the fence (R. p. 16). The feed troughs were located just north of the silo, and Mr. Dick's body was found just inside the south door of the silo room (R. p. 11).

Mrs. Dick discovered the body after she had returned from taking their daughter to school. There was a sprinkle of silage on the floor and on the steps of the silo shed. It was wet and more or less frozen (R. p. 13). Mr. Dick was wearing a jacket that was zippered up. He wore heavy fleecy gloves that could only with difficulty be inserted in the gun trigger guard (R. p. 22). There was no blood on these gloves. There was no blood on the gun.

There were two wounds. The wound along the chest was a grazing wound (R. p. 22). It was *not* pointed at the heart or any other vital organ. The second was a head wound and it caused instant death (R. p. 26).

Several months prior to his death Mr. Dick had trouble with vicious dogs. A few sheep were lost and quite a few

were mangled. A fox and badger had been seen around the farm yard. The gun was kept in the barn (R. p. 9). It was at least 28 years old (R. p. 10). On at least one recent occasion the gun had discharged accidentally (R. pp. 34-36).

A screwdriver was kept in the shed for the purpose of opening the south door because the knob was off (R. p. 10). Mr. Dick would have used this screwdriver if he intended to go out the south door of the shed. The sheriff who investigated did not know the length of this screwdriver (R. p. 21), nor did the sheriff ever have the screwdriver in his possession so as to determine that the gun could be fired by using the screwdriver.

Mrs. Dick did not start this lawsuit in the federal court. She commenced the action in the North Dakota State Court. It was removed to the federal court because $7,500 was involved and there was diversity of citizenship. The removal was brought about by the insurance company. The jury found that the death was not a suicide. The trial court refused to overturn the verdict. The circuit court granted judgment for the insurance company.

ARGUMENT

There were obvious questions of fact involved in this lawsuit and the circuit court's decision has denied to the petitioner her right to trial by jury under Amendment VII of the United States Constitution. The circuit court's decision is in conflict with *all* relevant decisions of the North Dakota Supreme Court. Its decision is on an important question of North Dakota law. The North Dakota Supreme Court has held for 50 years that suicide cases are to be submitted to the jury where there is evidence consistent with accidental death. There was abundant evidence of ac-

cidental death in this case. The circuit court in its decision acknowledges that for it weighs the evidence and states:

> "The improbability of his being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received."

We think that the court's weighing of the evidence is faulty and that the improbability that a man wishing to take his own life would draw on heavy, bulky gloves that could hardly be forced into the trigger guard, and the fact that there would be no blood on these gloves is of far greater significance than the presence of a screwdriver. The latter was not important to the jury. The circuit court has drawn a speculative inference from the screwdriver which the jury did not and was not compelled to draw.

At no time, either in the district court or in the circuit court did the insurance company cite a single North Dakota holding that this case should not have been submitted to the jury. It was the position of the insurance company that the North Dakota rule was not applicable and that the court should apply what they described as "the modern rule and the best rule." The decision of the 8th circuit is clearly in conflict with the North Dakota law. Under *Erie v. Tompkins*, 304 U. S. 64, 82 Law Ed. 1188 it was required to follow that law and this it did not do.

In addition to all of the affirmative evidence outlined above and in the statement of the case in North Dakota there is a presumption against suicide and this presumption has the weight of affirmative evidence. It stays with the plaintiff all through the lawsuit. The most recent holding is *Svihovec v. Woodmen Acc. Co.* (N. D. 1939), 69 N. D. 259, 285 N. W. 447.

"The rule announced by this court in Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non intentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens v. Royal Neighbors, 14 N. D. 116, and it follows as a fair construction of sections 7934 and 7936 Compiled Laws of North Dakota. 1913."

Svihovec v. Woodmen Acc. Co. (N. D. 1939), 285 N. W. 447.

In the case of *Clemens v. Royal Neighbors of America* (N. D. 1905), 14 N. D. 116, 103 N. W. 402 the insured talked to his religious advisor, wrote a note saying, "Bury me at Leonard. Kiss the children for me. Don't take this too hard." The lower court directed a verdict for the insurance company and the North Dakota Supreme Court held that this was proper, and laid down the rule that has been followed in North Dakota for more than 50 years.

"The plaintiffs insist that these undisputed facts should have been submitted to the jury, to determine whether Clemens' death was caused by his own voluntary act or by other means. The presumption is that a death caused by unexplained means was not suicidal. In the absence of proof, such death will be

presumed to have been caused by accidental means. Stevens v. Continental Casualty Co., 12 N. W. 469, 97 N. W. 862, and cases cited. And the burden of proof is upon the insurer to show that death was caused in a manner or by means that exempt him from liability. Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. *If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find verdict for the defendant.* We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory. If it be said that it might have been an accidental death, or one criminal by another, the note conclusively rebuts such possibility. The circumstances of meeting his employer, his shortage, and the impending exposure that must follow, the note, the position of the wound, the blood on the revolver and on the mirror, and that he was alone in the room are sufficient facts, as a matter of law, to overcome the presumption against a death by suicidal means. A verdict for the plaintiff under such circumstances could not be sustained, and *would be without any evidence to support it.*" (Italics supplied.)

Clemens v. Royal Neighbors (N. D. 1905), 14 N. D. 116, 103 N. W. 402.

That case represents the law in North Dakota. It may be and probably is different from the law in most jurisdictions, but it is the law that the federal court was bound to follow. In the trial of this lawsuit in the district court and in the appellate proceedings in the circuit court the insurance company cited no North Dakota cases to the con-

trary. It contented itself with taking the position that this North Dakota rule was not applicable and that the court should adopt what it called "the modern rule and the best rule."

We recognize that writs are sparingly granted, but the failure to follow the North Dakota law and the denial to Mrs. Dick of her right to trial by jury, is of sufficient importance, not only to the petitioner, but to other citizens of North Dakota, that we submit the writ should be allowed.

Wherefore, it is respectfully submitted that petitioner's prayer for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeal should be granted.

Dated April 21, 1958.

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APPENDIX

United States Court of Appeals
For The Eighth Circuit.

No. 15,760.

New York Life Insurance Company, a corporation,
Appellant,

vs.

Blanche Dick,
Appellee.

[February 7, 1958.]

Appeal From The United States District Court For The District Of North Dakota

OPINION

Norman G. Tenneson for appellant; Donald C. Holand and Philip B. Vogel for appellee.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Sanborn, Circuit Judge.

This is an appeal from a judgment for the plaintiff (appellee) in an action against the New York Life Insurance Company for double indemnity benefits under policies of life insurance. Jurisdiction was based on diversity of citizenship and amount in controversy.

William Dick, a North Dakota farmer, forty-seven years of age, while alone with a double-barrel shotgun in the silage shed of his farm on the morning of January 20, 1955, was twice shot by the gun. The first shot severely wounded him on the left side of his chest. The second shot was in the head and killed him instantly.

At the time of his death, William Dick had two policies of life insurance issued by the New York Life Insurance Company, payable to his wife, Blanche Dick, as beneficiary. The policies were in force. Each contained a double indemnity clause. The clause provided that double indemnity should be payable upon receipt of due proof that the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means," but that such indemnity should not be payable if the insured's death resulted from "self-destrucion, whether sane or insane."

Blanche Dick, claiming that the shooting was accidental, demanded double indemnity. She brought this action upon that claim. The company in its answer denied that the insured's death was the result of an accident. As an affirmative defense it alleged that his death resulted from self-destruction.

The company paid to Blanche Dick the full face of the policies. The issue whether or not the insured met his death as the result of an accident was tried to a jury. Since the insured's death obviously resulted from means which were both external and violent, the sole issue at the trial was, as a practical matter, whether the death was or was not accidental. At the close of the evidence, the company moved for a directed verdict on the grounds that the evidence was insufficient to make the issue one of fact for the jury and that it conclusively showed that the death was

suicidal. The motion was denied. The jury returned a verdict for the plaintiff. The company moved that the verdict be set aside and that judgment be entered in its favor in accordance with its motion for a directed verdict, or, in the alternative, that it be granted a new trial because of alleged errors of the court during the trial. The motion was denied, and this appeal followed.

The main question for decision is whether there was an adequate evidentiary basis to make the issue whether the insured's death was accidental one of fact for the jury.

The policies in suit are North Dakota contracts, and the applicable substantive law is the law of that State. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.[1]

In determining whether the company was entitled to a directed verdict, we must give to the plaintiff the benefit of all reasonable inferences which can be drawn from the evidence, viewed in the aspect most favorable to her. She is not, however, entitled to the benefit of inferences which are unreasonable (*Russell v. Turner*, 8 Cir., 148 F. 2d 562, 565), or which are opposed to the undisputed physical facts. *Elzig v. Gudwangen*, 8 Cir., 91 F. 2d 434, 440 and cases cited.

We find it unnecessary to outline the evidence in complete detail. We have studied it, and the parties are entirely familiar with it. The plaintiff's evidence tended to

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[1] In *Guaranty Trust Co. v. York*, 326 U. S. 99, 109, the Supreme Court said:

"* * * The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co. v. Dunlap*, 308 U. S. 208, * * *."

show that the insured had no motive to commit suicide; that he was a cheerful man, on excellent terms with his wife, family and friends; that he had no financial worries; that he was 5 feet 7 inches tall, weighed about 165 pounds, and was in good physical condition, except for some prostate trouble which "bothered him a little but it wasn't bad"; that he might have kept his shotgun in the barn, loaded and cocked, because of some past trouble with vicious dogs bothering and killing his sheep; that in the small silage shed between the barn and the silo, where his body was found with the shotgun beside it, there was some silage on the floor which might have caused him to slip and fall; that in the evening of the day preceding his death his attitude and actions were normal, and were the same the following morning when he had breakfast with his wife and fourteen-year-old daughter; that after breakfast he got out the automobile so that his wife could take the daughter to school, and then, with his work clothes on, went about his usual farm chores and fed his cattle in the feed lot adjoining the silage shed; that it was after his wife's return from the school and after she had done her housework and was waiting for him to go with her to a cousin's house to help make bologna, that, about 10:30 a.m., she went to the barn to look for him, and found his body lying on its back on the floor of the silage shed; that she ran to the house and notified his brother and a nephew to come at once; that her husband was a hunter, experienced in the use of firearms, and had had the double-barrel shotgun which caused his death for many years; and that at the time of his death he was wearing rubbers and gloves.

There was evidence that the insured was seldom moody, and then for only brief periods; that he was an able-bodied, strong man, and that nothing he had done or said gave any indication that he contemplated suicide.

The defendant's evidence related largely to the physical facts indicating where and how the death occurred and what caused it. The evidence showed that the Sheriff of the County and the Coroner, Dr. Veitch, who was also the insured's physician and a medical examiner for the insurance company, arrived at the farm about 11:00 a.m. on January 20. The Sheriff testified that the body was lying on its back, with the head in the direction of the silo and the feet toward the door leading from the shed to the outside; that the eyes and frontal part of the head were torn off; that he observed a powder burn above the left ear; that the gun was lying alongside the body, about 18 inches away, with the stock toward the feet and the muzzle about at the chest; that the Sheriff took possession of the gun, a twelve-gauge Stevens double-barrel shotgun with two triggers, one ahead of the other; that the front trigger fires the right barrel, and the rear trigger fires the left; that there is a safety device on top of the stock, just behind the device which "breaks" the gun; that the safety device has to be pushed forward before the gun can be fired; that he made various tests with the gun "off safe" to see whether it could be fired by dropping or jarring it, and found that the triggers would not release; that it required about a seven-pound pull to touch off the triggers; that during his investigation in the shed he picked up the gun, "broke" it, and found two discharged shells in the chambers; that he found two 12-gauge loaded shells in the deceased's jacket; that he took possession of the clothing worn by William Dick when he died; that in the silage shed he also saw a screwdriver eight to ten inches long, located about eight or ten inches from the gun and to the left of it; that the gun was dry and clean; that tissue blown from the head was in the southeast corner of the shed and partly on the outside

door and the east wall, covering an area of five or six feet, most of it four or five feet from the ground; that there were also shot particles on the wall in several different places, probably six or eight feet from the door leading in from the barn, on the east side of the shed; that he saw no shot on the north wall; that there was a cap lying on the floor near the wall to the right of the head of William Dick; that after the body had been taken to the funeral parlor, he saw the wound in the left side of the chest; that in his opinion the shot that made this wound was from the ground upward; that there were holes in the outside jacket and the shirt corresponding to the location of the chest wound.

The testimony of Dr. Veitch, the Coroner, corroborated that of the Sheriff as to the location of the body in the shed and the nature and extent of the wounds. He testified that the head wound caused the death, that the chest wound was mortal but not immediately fatal, and that it would shortly have caused Dick's death; that it was terribly painful but would not have caused him to lose consciousness; that the pain must have been unbearable; that the doctor's opinion was that after the chest wound the insured could still have fired the shotgun; that the gun was eight to twelve inches away from the body, and the screwdriver further away; that he observed definite powder marks on the skin of the left forehead in front of the left ear; that "they extended a half inch to an inch, quite a high concentration of a powder burn."

Dr. Veitch also testified that from September 13 to December 30, 1954, he had been treating the insured for "a form of mild to moderate non-specific prostatitis"; that the insured called upon the doctor for treatment twice in September, three times in October, twice in November, and

the last time on December 30, when Dick "was in a very fine state of mind and wished me a happy New Year"; that the symptoms of his trouble were ache and pain; that his illness would not prevent him from doing his work; that "He would do his work every day in spite of the misery he was having."

The doctor testified that in connection with the claim of Blanche Dick against the defendant he signed some proofs of death, which, under "Cause of death," stated "Death from self inflicted shotgun wounds, 1. Left chest, 2. Frontal area of head."

There was testimony that an examination of the jacket worn by the insured showed powder marks on the front near the hole where the shot entered.

There was other testimony tending to support the defendant's theory that the death of the insured was not an accident.

There are certain facts which we think were definitely established by the evidence: 1. That the insured was a man of good character and reputation, who had no adequate reason for taking his own life. 2. That the wounds inflicted upon him came from shots from his own shotgun, which he must himself have loaded and cocked. 3. That the shots came from in front of and in close proximity to his body. 4. That the shotgun was in good working order, was off safety and was ready to be fired when it was fired. 5. That neither barrel could have been fired unless someone or something either pulled or pushed one of the triggers. 6. That no person other than the insured could have pulled or pushed a trigger; and that there was nothing to account for one barrel of the gun being first fired accidentally into his chest and the second barrel being then fired accidentally into his head. The improbability of his

being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received.

One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.

The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case that death was accidental, and "that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury." *Svihovec v. Woodmen Accident Co.*, 69 N. D. 259, 285 N. W. 447, 449.

If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed.

Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, *Burkett v. New York Life Ins. Co.*, 5 Cir., 56 F. 2d 105, and *Svihovec v. Woodmen Accident Co., supra.*

The judgment is reversed with directions to enter a judgment dismissing the complaint.

United States Court of Appeals
For The Eighth Circuit

No. 15760
September Term, 1957.
Friday, February 7, 1958.

New York Life Insurance Company, a corporation,
Appellant,

vs.

Blanche Dick,
Appellee.

Appeal From The United States District Court For The District Of North Dakota

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ORDER

This cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Blanche Dick the sum of Two Hundred Seventy-eight and 50/100 Dollars for its costs in this behalf expended, and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment dismissing the complaint.

Dated February 7, 1958.

CLERK'S CERTIFICATE

I, Eugene C. Fisher, Acting Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed record on which the appeal from the United States District Court for the District of North Dakota was heard and decided in said Court of Appeals in the case of New York Life Insurance Company, a corporation, appellant, v. Blanche Dick, appellee, No. 15760, together with full, true and complete copies of opinion and judgment of said Court of Appeals.

And I do further certify that on the 28th day of February, A. D. 1958, mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the District of North Dakota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 20th day of March, A. D. 1958.

/s/ EUGENE C. FISHER,
Acting Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal of the Court)